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Supreme Court of the United States

October Term, 1953

No. 165

WILLIAM PROPST, on behalf of himself and all holders of School Land Leases in the State of Nebraska, similarly situated and GRACE GREEN, Intervenor,

Petitioners,

vs.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS of the State of Nebraska; VAL PETERSON, Governor of the State of Nebraska; CLARENCE BECK, Attorney General of the State of Nebraska; and HENRY H. BARTLING, Secretary to the Board of Educational Lands and Funds of the State of Nebraska,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

William Propst, on behalf of himself and all holders of School Land Leases in the State of Nebraska, similarly situated and Grace Green, intervenor, the petitioners herein, pray that a writ of certiorari be issued to review the final judgment of the Supreme Court of Nebraska affirming the decree of the District Court of Lancaster County, Nebraska, denying the injunction prayed for and dismissing the petitions of plaintiffs and intervenor.

OPINIONS BELOW

The opinion of the District Court of Lancaster County, Nebraska, is not officially reported (R. 27). The opinion of the Supreme Court of Nebraska is reported in 156 Neb. 226, 55 N. W. II 653 (R. 88). The motion for rehearing was denied without opinion.

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JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on November 21, 1952. The motion for rehearing was denied on February 7, 1953. The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3). The federal question herein, violation of the Fourteenth Amendment to the United States Constitution, was first raised on motion for rehearing in the Supreme Court of Nebraska. That motion was denied without opinion. Although as a general rule, a federal question may not be raised for the first time on motion for rehearing, it is submitted that the instant case comes within the recognized exception to that rule because: (1) The grounds on which the Supreme Court's decision was based had not been raised at any prior stage in the proceedings and could not have been anticipated by the petitioners; and (2) The action from which relief is sought herein was not state action within the meaning of the Fourteenth Amendment of the Constitution until the judgment of the Nebraska Supreme Court was rendered. Therefore, as more particularly shown below (page 7), the federal question was timely raised in this case at the first available opportunity.

QUESTIONS PRESENTED

I.

May a state cancel its lease agreements with some 2300 lessees on the basis of a prior adjudication in an action to which none of them were party and in which none of them had an opportunity to be heard?

II.

May a state deprive its citizens of their rights under certain lease agreements without giving them any notice of such action or any opportunity to be heard in support of these rights?

III.

Does a holding by the highest court of a state that an amendment to a statute is unconstitutional deprive the original statute itself of all authority?

STATUTE INVOLVED

Prior to the passage of the amendment, which was held to be unconstitutional, the Nebraska statutes provided that a present lessee was given the right, at the expiration of his lease, to apply for and receive a new lease without a public offering if no third party presented a bonus bid to the Board for the expiring leasehold. If a third party presented such a bid then the lease would be offered at public auction to the highest bidder. S. 72-733, R. R. S. 1943. "A right of the lessee to a renewal lease upon the expiration of his contract was conditioned that no person offered a higher bid for the leasehold than the lessee did (R. 90).

The unconstitutional amendment to the above statute granted an existing leaseholder, upon the expiration of his contract, an automatic right to a new lease irrespective of any bid made by a third party (Laws 1947, c. 235, p. 743) (R. 90).

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STATEMENT

This is a class action wherein the plaintiff, William Propst on behalf of himself and others similarly situated, sued to enjoin the defendant, Board and certain other officers who were members of the Board, from canceling and treating as invalid certain leases on State School Land, and to enjoin the defendants from offering such land at public auction for lease to other persons.

The intervenor, Grace Green, filed her petition in intervention as a member of the class.

The Plaintiff, William Propst, until January 1, 1950, was a lessee of state school land under a 25 year lease, expiring December 31, 1949. Prior to the expiration of this lease, he applied for and received a new lease for a term of 12 years, commencing January 1, 1950.[1] On receipt of his new lease the plaintiff continued in possession, continued farming operations on the land, paid the stipulated rental and otherwise complied with the terms of the lease. The new lease was considered and treated as valid, by the Board, until the decision of the Nebraska Supreme Court in *State ex rel Ebke v. Board of Educa-*

1 By legislative act the term of these leases had been changed from 25 years to 12 years.

tional Lands and Funds, et al., 154 Neb. 244, 47 N. W. 2d 520. The original opinion in that case was filed on April 26, 1951, and on rehearing the opinion was modified, 154 Neb. 596 on July 10, 1951. In this and other companion cases,[2] subsequently decided, the Nebraska Supreme Court held a 1947 amendment to the School Land Laws* to be unconstitutional as violating a state constitutional provision declaring this land trust property.

Thereafter, on August 13, 1951, the defendant Board, acting under the supposed authority of the Ebke and companion cases, *supra,* passed a blanket resolution, declaring void and canceling all new leases which had been entered into from and after January 1, 1948 (R. 5). The resolution provided that the Board's prior orders authorizing the granting of such leases should be vacated, and directed the Board's secretary to offer the leases at public auction to the highest bidder of a bonus over and above the annual rental. None of the parties, whose leases were so canceled and put up for sale, were given any prior notice of the Board's action (R. 31).

The defendant, Board, canceled and proceeded to advertise for sale all such leases, without first securing or attempting to secure any adjudication as to their validity or invalidity, disregarding the fact that no judicial tribunal had determined the facts concerning each lease

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2 **Todd v. Board, 154 Neb. 606, 48 N. W. 2nd 706; Watson Hay Co. v. Board, 154 Neb. 613, 48 N. W. 2nd 711; Hana v. Board, 154 Neb. 619, 48 N. W. 2nd 715. These cases are not important to the consideration of this petition as they simply follow the Ebke case in holding the 1947 amendment unconstitutional as applied to the factual matters and the parties before the court.**

* **("Statute Involved" page 3)**

to be identical or even similar with the facts regarding the leases before the court in the Ebke case.

While the defendants, through state officers and under the direction of the Attorney General, were proceeding with such sales, the plaintiff on behalf of himself and some 2300 other lessees similarly situated, brought this suit for injunctive relief against the Board and its officers and members. The District Court held that this was a proper class action, but denied the injunction. The plaintiff and intervenor appealed to the Nebraska Supreme Court, which court affirmed the judgment of the District Court in denying this injunction and dismissing the petitions.

The plaintiff and the intervenor, Green, filed timely motion for a rehearing before the Supreme Court. In this motion they asked that the court determine the appeal as to the rights of the intervenor. Also that a rehearing be held to determine federal constitutional questions, which the court's decision had injected into the case, and which could not have been anticipated, and alleged that the acts of the defendant, Board, as sustained by the court, had become State action prohibited by the Fourteenth Amendment and the Contract Impairment Clause of the Constitution of the United States (R. 96-97).

The Supreme Court of Nebraska on February 7, 1953, denied the motion for rehearing without an opinion (R. 98).

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REASONS FOR GRANTING THE WRIT

I. Petitioner's raising of the federal question below on motion for rehearing was timely because the decision of the Supreme Court of Nebraska introduced the Federal Constitutional issue for the first time.

A. *The Action From Which Relief Was Sought Did Not Constitute State Action Until The Judgment Of The Nebraska Supreme Court Was Rendered.*

The action of the Board in canceling these leases did not constitute state action within the Fourteenth Amendment until such action was sustained by the Supreme Court of the State. *Barney v. City of New York*, 193 U. S. 430 (1904); See also *Raymond v. Chicago Union T. Co.*, 207 U. S. 20 (1907); *Snowden v. Hughes*, 321 U. S. 1 (1944).

Petitioners alleged in the trial court as well as on appeal that the action of the Board violated due process as inhibited by the State Constitution, but in view of the above rule, they did not contend that the action of the Board was wihin the jurisdiction of the Federal Constitution until the same was sustained by the State Supreme Court. Therefore, only after the State Supreme Court had sustained this action could it have been attacked as violative of the Federal Constitution.

B. *The Basis For The Decision Of The Supreme Court of Nebraska Raised The Federal Constitutional Issue For The First Time.*

The Supreme Court of Nebraska said in its opinion:

> "It was the decision of the court in the Ebke case that gave the renewal leases their status of il-

legality and not the action of the Board in entering this fact upon its records, by its declaration or by its vacation of the previous orders concerning the issuance of the leases. There was nothing the Board could do or that appellants could have interposed if they had been present at the meeting of the Board when this was done that would have affected the invalidity of the leases. The Board did not violate rights by this action because no rights in this regard existed." (R. 94.)

The foregoing statement is equivalent to saying that the decree in *State ex rel Ebke v. Board of Educational Lands and Funds, et al.*, 154 Neb. 244, 47 N. W. 2d 520, in which none of these 2300 lessees were parties or privy adjudicated that these leases were void, and that these lessees had no rights under their contracts with the State of Nebraska. It is important to bear in mind that the State of Nebraska was not a party in the Ebke case and that the Ebke case was an action under the Declaratory Judgment Statute of the State of Nebraska seeking a declaration as to the constitutionality of a statute of the state. The order or decree, in the *Ebke* case, notwithstanding the language used in the opinion, confined itself simply to a declaration that the statute involved was unconstitutional as it pertained to the factual matters presented as applied to the parties before the court, and it could not bind or estop either the State of Nebraska or these 2300 lessees who were not parties to the action.

The court points out, in its opinion (R. 91), that no notice was given these petitioners prior to the Board's action, but attempts to excuse this apparent violation of due process by saying that we had heretofore had our day in court by virtue of the *Ebke* decision, and that

nothing we could have interposed, if we had been given an opportunity to defend our rights, would have affected the matter.

> " * * * When the judgment of a state court ascribing to the judgment of another court the binding force and effect of res judicata, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have been thus adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes." *Hansberry v. Lee,* 311 U. S. 32, 40 (1940).

We could not have anticipated that the Nebraska court would render a judgment holding that all our rights were determined and decided in a former case to which we were not parties or privy to the parties therein. It was not pleaded in this case that the Ebke case or any other cases, decided by the Nebraska court was *res judicata.* If the judgment, itself, injects into the case a federal question, which could not have been anticipated, it is obvious that this question could not have been raised until after the judgment had been entered and become a final decree of the court.

A judgment of a state court so construing a state statute as to cause it to infringe federal rights is reviewable in the Supreme Court even though the federal question was first presented to the state court by a petition for rehearing which was denied, without referring to the federal question, if the construction was one that the party affected could not have anticipated and the federal ques-

tion was presented by him at the first opportunity. *Missouri ex rel Ins. Co. v. Hehner,* 281 U. S. 313 (1930).[3]

The Nebraska court in the last paragraph of its opinion (R. 95) made an independent finding as to waiver or estoppel, which the defendants had pleaded in defense, but it is apparent that such asserted estoppel cannot independently and adequately support the judgment, because it is not shown that any other lease was sold and bid back by the old lessee, and this asserted estoppel, against Propst, could not conclude the other 2300 lessees who had not done the same thing. Also the record shows that the intervenor's lease was not sold pending this litigation, so that she represents all of the class, except Propst, in this respect, and the court refused to make any adjudication or disposition whatever as to intervenor's rights, even when this had been called to the attention of the court in the motion for rehearing (R. 98).

> "The appellees insist that * * * it appears that the Supreme Court exercising its proper authority, made an independent finding as to the waiver or estoppel which the appellees had pleaded in defense. But the federal ground being present, it is incumbent upon this court, when it is urged that the decision of the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guarantees may appropriately be enforced, whether the asserted non-federal ground independently and ade-

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3 In Illinois ex rel McCollum, 333 U. S. 203, it was contended that the judgment of the state court did not draw in question the validity of a statute specifically authorizing the wrongful act of the school board as required by 28 U. S. C. 344. However, the court said, "But the state Supreme Court has sustained the validity of the program on the ground that the Illinois statute granted the Board authority to establish such a program. This is sufficient to show that the validity of the Illinois statute was drawn in question within the meaning of 28 U. S. C. 344."

quately supports the judgment." *Abie State Bank v. Bryan*, 282 U. S. 765, 772 (1931); see also *Chicago, Burlington & Quincy R. Co. v. People of the State of Illinois*, 200 U. S. 561 (1906).

A federal claim first raised by petition for rehearing in a state court is in time for purposes of review here if it was raised at the first opportunity, even though the petition was denied without opinion. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673 (1930); see also, *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932).

II. The state of Nebraska, by failing to accord petitioners their rights of notice and hearing before canceling these leases has deprived petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

It is admitted that no notice of any kind was given to these lessees prior to the action of the Board canceling and voiding these leases, and the court so found. "The appellee [Board] without notice to the lessees formally declared that all of the renewal leases issued by it under the 1947 act were void * * *. (R. 91.) Nor is it contended that the Board made any findings of fact upon which to base its action. It held no hearing and adduced no evidence to determine if the facts in the Ebke case were the same as the facts relating to the leases of these 2300 lessees, or to determine if these lessees were in the same position and category as the parties in the Ebke case. As recited by the court, "These things were done by the Board entirely as expressed in its records because of what this court had held in the cited school land cases. The appellee

[Board] because of these decisions *assumed* that all the leases issued by it under the 1947 act were void from the time that they were issued and created no right in anyone * * *." (Italics supplied.) (R. 91.)

It is, of course, fundamental that the Board, in issuing these leases, acted only in a ministerial capacity and that when the leases were executed they became contracts between the State and the lessees.

It is apparent, therefore, that the Nebraska court has now, by sustaining this action of the Board, made it a law of the State, within the constitutional inhibitions, and sustained the right of the Board to cancel and void these contracts between the State of Nebraska and its lessees, on the *assumption* of the Board that the leases were void, even though these lessees had no notice of such intended action and no opportunity to be heard in their defense or to challenge this *assumption.*

The Board also must have *assumed* that these 2300 leases were issued under and by virtue of the unconstitutional amendment, because, at the time it canceled these leases no court or judicial tribunal had so declared. The Ebke case has pronounced the amendment unconstitutional and according to Nebraska concept, it therefore never existed. What right, therefore, did the Board have to *assume* that these leases were issued under a statute that never existed? Should it not have more properly *assumed* that the leases were issued under the valid statute that did exist and which could not be changed by an unconstitutional amendment?

In fact and in principle it had no right to act, by canceling these leases and depriving these 2300 lessees of

their property and impairing the obligation of the State's own contracts with these lessees, on any *assumption,* but could only act within the guarantees of due process after these *assumed* facts had been properly established, if at all, by some judicial tribunal, acting within the guarantees of due process.

The court, in the instant case, did not presume to make any determination of the rights of the parties herein except to deny the injunction, by holding that it was determined in the Ebke case that these lessees had no rights and that they were estopped by the judgment in that case. The Court takes the false position that its declaration that the 1947 amendment was unconstitutional disposed of all rights of these lessees and that such a declaration is *res judicata* to any other action involving leases issued after the enactment of such amendment.

It is fundamental that a decision, declaring a statute unconstitutional cannot be pleaded as an estoppel, but can be relied on only as a precedent. The opinion or reasons of the court may operate as a precedent for the determination of other similar cases. The parties to that suit are concluded by the judgment, but no one else is bound. A new litigant may bring a new suit, based upon the very same statute and the former decision cannot be pleaded as an estoppel, but can be relied on only as a precedent. *Shephard v. Wheeling,* 30 W. Va. 479, 4 S. E. 635 (1887).

A federal question is presented where the property interests of one not a party to a state litigation are injured by an order in that litigation. *Boynton v. Moffat Tunnel Improvement Dist.,* 57 F. (2d) 772, cert. den., 287 U. S. 620 (1932).

III. If petitioners had been given a hearing on their rights, these leases could not have been lawfully canceled because they were authorized by the original statute even assuming that the 1947 amendment was unconstitutional.

The Nebraska court asserted that, "The judicial declaration, that the automatic renewal plan of 1947 was invalid, effectively disposed of any and all alleged rights of appellants, granted by, applied for and accepted by them under that act. The law of this state has always been that *an unconstitutional statute is a nullity, is void from its enactment and is incapable of creating any rights or obligations.*" (Italics supplied.) (R. 93.)

The Nebraska court sought to enforce the above common-law rule without regard to its effect upon the constitutional rights of these lessees. These lessees entered into contracts with the State of Nebraska, performed their obligations thereunder and operated thereunder for from one to four years. The Supreme Court of Nebraska has now invoked a common-law rule, formulated by it, to take from these lessees their property rights. As stated by this court in *Shelley v. Kraemer,* 334 U. S. 1, 17 (1948), "It has been recognized that the action of state courts in enforcing a substantive common-law rule, formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conception of procedural due process."

The Federal Constitution denies the right of a state to take the property of its citizens, except under the police power of the state, and denies the right of the state to

impair the obligation of its own contracts. Under the above rule, announced by this court, the Nebraska court cannot invoke its formulated common-law rule, that an unconstitutional statute is a nullity to defeat these limitations placed upon it by the Federal Constitution, even though it might have acted in accordance with the most rigorous conception of procedural due process, which it obviously failed to do.

The common-law rule, that an unconstitutional statute is a nullity and incapable of creating any rights or obligations, stems from the old case of *Norton v. Shelby County,* 118 U. S. 425 (1886), wherein other courts took this statement from the opinion and used it out of context with the rest of the opinion and the facts in the case. This rule has been largely discarded by a number of courts and this court no longer follows this rule, if indeed it ever did. Chief Justice Hughes, speaking for the court in the case of *Chicot County District v. Baxter State Bank,* 308 U. S. 371, 374 (1940), said that the actual existence of even an unconstitutional statute is an operating fact and may have consequences which cannot be ignored.

If the Nebraska court insists on following its common-law rule, that an unconstitutional statute or amendment is a complete nullity, then it cannot escape the natural corollary that such an invalid amendment does not repeal or change the act which it attempted to amend. It therefore follows that the original act,* unaffected by the invalid amendment,** is and always was the law governing

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* (See page 3.)
** (See page 4.)

the renewal of school land leases. It is a universal rule of all courts, including Nebraska,[7] that an unconstitutional amendment does not affect or change the original act, which remains the law upon the subject, unaffected by the invalid amendment.

The Nebraska court, in an effort to escape the operation of this rule, argues that it cannot apply here, because the parties *believed* that they were operating under the unconstitutional amendment, and that even though these renewal leases and the issuance of the same, complied with all legal requirements of the original act, they are still a nullity because the parties *intended* to operate under the unconstitutional amendment.

It is undisputed that these leases and the method of issuing them complied with all requirements of the unamended original act. Therefore said original act, unaffected by the invalid amendment, is a part of said leases and must determine the rights of the parties thereto.

In *Shelley v. Kraemer*, 334 U. S. 1, 20 (1948) this court, in an opinion by Chief Justice Vinson, said:

> "We have noted that previous decisions of this court have established the proposition that judicial action is not immunized from the operation of the Fourteenth Amendment simply because it is taken pursuant to the state's common-law policy * * *. State action, as that phrase is understood for the purpose of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of

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7 "If Chapter 1, Laws 1944, were unconstitutional for any reason, the previous acts on the subject would remain in full force and effect." State ex rel Baldwin v. Strain, 152 Neb. 763, 42 N. W. 2nd 796 (1950).

the Fourteenth Amendment it is the obligation of this court to enforce the constitutional commands."

If, as stated in *Shelley v. Kraemer*, supra, the enforcement of a substantive common-law rule may result in the denial of constitutional rights, the natural corollary thereto must be that an arbitrary refusal to enforce a universal common-law rule will accomplish the same thing. The refusal of the Nebraska court to measure these leases by the *only* law in existence, and its action in measuring the leases by a law they admit never existed has resulted in the denial of rights guaranteed by the Constitution of the United States.

> "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a state, whenever such a court shall adjudge that not to be a contract, which has been alleged * * * by a litigant, to be one * * *." *Jefferson Branch Bank v. Skelly,* 1 Black 436, 66 U. S. 436, 443 (1861).

IV. The harmful effects of the decision below will be far-reaching unless corrected by this court.

The questions herein are important and substantial. They involve the rights of a state to confiscate the property of some 2300 of its citizens, the right of these people to their day in court and the right of the State to impair the obligation of its own contract. While the record does not reflect it, yet it is a matter of common knowledge in Nebraska, that the value of these leases amounts to several millions of dollars, and involves thousands of acres of farm and ranch lands. The summary ejectment of these people from their farms and ranches, which they had a right to assume, by virtue of their contracts with

the State of Nebraska, would be theirs for at least 12 years, has forced hundreds of these people out of business and compelled them to sacrifice their crops, improvements, emblements and stock.

Of grave importance is the question as to whether the State of Nebraska can enter into contracts with its citizens and after the contracts have been fully performed, impair their obligations and cancel and void the same in flagrant violation of constitutional inhibitions. This action of the Board and the Supreme Court of Nebraska will, if left to stand, cause the integrity of the State of Nebraska to be questioned in all its dealings with its citizens. The leases that have been sold at auction, as a result of this action, may well be questioned as to their validity and legality, irrespective of the Board's conduct in canceling these leases.

If this decision is allowed to stand it will set a precedent for the State of Nebraska to annul and cancel any contract it may make if it later determines that it wishes to escape its obligations or if subsequent events should indicate the same not to be to its liking.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

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October Term, 1953.

No. 165.

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WILLIAM PROPST, on behalf of himself and all holders of School Land Leases in the State of Nebraska, similarly situated and GRACE GREEN, Intervenor, PETITIONERS

V.

THE BOARD OF EDUCATIONAL LANDS AND FUNDS of the State of Nebraska; ROBERT B. CROSBY, Governor of the State of Nebraska; CLARENCE S. BECK, Attorney General of the State of Nebraska; and HENRY H. BARTLING, Secretary to the Board of Educational Lands and Funds of the State of Nebraska, RESPONDENTS.

——::——

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

——::——

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

——::——

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——::——

OPINION BELOW.

The opinion of the Supreme Court of Nebraska is reported in 156 Neb. 226, 55 N. W. (2d) 653.

JURISDICTION.

William Propst, on behalf of himself and the holders of school land leases in the State of Nebraska, similarly situated, and the intervener, Grace Green, sought an injunction to prevent the Board of Educational Lands and Funds of the State of Nebraska from treating as void certain renewal leases of state school lands previously issued by it; from attempting to offer new leases on such land at public auction; from approving any bid received at the auction; and from executing a lease to any purchaser as a result of such sale proceedings.

The District Court of Lancaster County refused to grant an injunction, and dismissed the action. On appeal the Supreme Court of Nebraska affirmed. Petitioners filed a motion for a rehearing which was overruled (R.98).

The jurisdiction of this court is invoked under Title 28 U.S.C., Section 1257(3).

QUESTION PRESENTED.

Does the refusal by the Supreme Court of Nebraska, to recognize a contract entered into in contravention of the State's Constitution, constitute a denial of due process of law guaranteed by the Federal Constitution?

STATEMENT.

Prior to May 7, 1947, school land leases were issued for a term of twenty-five years from the first day of January next ensuing after the date of the lease. Each lease contained a covenant that "the premises will

be surrendered at the expiration of twenty-five years from the first day of January next ensuing after the date of the lease, or sooner with the consent of the board." Section 72-234, Revised Statutes, 1943; Section 72-217, Compiled Statutes, 1929; Section 5197, Compiled Statutes, 1922.

In *State* v. *Platte Valley Public Power and Irrigation District*, 147 Neb. 289, 23 N. W. (2d) 300, the Supreme Court of Nebraska construed the statute relating to granting a new lease to a lessee at the expiration of the old lease (Section 72-240, Revised Statutes, 1943; Section 72-218, Compiled Statutes, 1929; Section 5198, Compiled Statutes, 1922) and held that the lessee had merely a right to a new lease, provided no other person offered a higher bid and return to the State. The 1947 session of the Nebraska State Legislature, however, enacted Legislative Bill No. 33 (Laws of Nebraska 1947, page 743), which amended Section 72-240, Revised Statutes, 1943, and made it mandatory upon the Board of Educational Lands and Funds to issue a new lease, for a twelve-year period, to any lessee who made application therefor, provided he had: "* * * (1) followed the standards of soil conservation and good husbandry; (2) properly utilized the land for the purposes contemplated by the lease; (3) fully performed all covenants in the existing lease including payment of the required rental; and (4) has cooperated with the Board of Educational Lands and Funds in the proper care of the premises."

Pursuant to this act the Board issued twenty-three hundred thirteen leases to former lessees whose leases expired (R.31) regardless of the fact that other per-

sons were willing to pay, and offered to pay, a greater return to the State.

The Nebraska Supreme Court in *State, ex rel. Ebke* v. *Board of Educational Lands and Funds,* 154 Neb. 244, 47 N. W. (2d) 520, opinion modified in 154 Neb. 596, 47 N. W. 2d 526, held unconstitutional that portion of the act (Sections 72-240 and 72-240.01, Reissue Revised Statutes, 1943) which purported to grant this automatic renewal to the existing leaseholders. The original opinion in this case was filed on April 26, 1951, and the modified opinion on July 10, 1951. This ruling was affirmed in *Todd* v. *Board of Educational Lands and Funds,* 154 Neb. 606, 48 N. W. (2d) 706; *Watson Hay Company* v. *Board of Educational Lands and Funds,* 154 Neb. 613, 48 N. W. (2d) 711; and *Hanna* v. *Board of Educational Lands and Funds,* 154 Neb. 619, 48 N. W. (2d) 715. These opinions were all filed on July 10, 1951.

Subsequent to these opinions of the Nebraska court, and on the 13th day of August, 1951, the Board of Educational Lands and Funds adopted a resolution (R.56) which formally declared that all renewal leases issued by it under the 1947 act were void and vacated the proceedings under which the leases were made. The Board then, by letter (R.4-5) advised the leaseholders that the land would be offered for releasing at public auction.

Section 72-233, Reissue Revised Statutes, 1943, requires that notice of sale of school land leases be given "by publishing a notice thereof three weeks preceding said auction in one or more of the legal newspapers published or of general circulation in the

county in which said unleased land is located." School land leaseholders own the improvements upon the land and Section 72-240.06, Reissue Revised Statutes, 1943, provides that if the lease is made to a person other than the former lessee, the improvements upon the land must be paid for by the new lessee for the benefit of the former lessee, subject to any lien which the State may have for unpaid rental. This section also provides a method for appraising the value of such improvements.

The Board of Educational Lands and Funds proceeded to advertise and offer for sale new leases on the lands involved in accordance with the above mentioned statutes. At the time of trial in the district court sixteen hundred sixty of the leases had been sold and approved by the Board (R.48). In addition two hundred thirty leases had been offered for sale but had not been submitted to the Board for approval (R.49). At this time all of the lands covered by these void leases have been re-leased and new leases issued to the high bidders.

Prior to the commencement of this action, plaintiff Propst brought a similar action in the United States District Court for the District of Nebraska. The matter was heard by a three-judge court which denied the relief prayed for by the plaintiff. *Propst* v. *Board of Educational Lands and Funds*, 103 Fed. Supp. 457. Appeal to the United States Supreme Court was dismissed for want of a substantial federal question, 343 U. S. 901, and a rehearing denied, 343 U. S. 937.

ARGUMENT.

The Nebraska Supreme Court declared the 1947 Legislative Act, Sections 72-240 and 72-240.01, R. R. S. 1943, unconstitutional. *State, ex rel Ebke* v. *Board of* Educational Lands and Funds, 154 Neb. 244, 596, 47 N. W. (2d) 520. The law of Nebraska has always been that an unconstitutional statute is a nullity, is void from its enactment, and is incapable of creating any rights or obligations.

Propst v. *Board of Educational Lands and Funds,* 156 Neb. 226, 55 N. W. (2d) 653;
Finders v. *Bodle,* 58 Neb. 57, 78 N. W. 480;
Anderson v. *Lemkuhl,* 119 Neb. 451, 229 N. W. 773;
Central National Bank v. *Sutherland,* 113 Neb. 126, 202 N. W. 428;
Whetstone v. *Slonaker,* 110 Neb. 343, 193 N. W. 749;
Lennox v. *Housing Authority of City of Omaha,* 137 Neb. 582, 290 N. W. 451, 291 N. W. 100.

Petitioners admit the correctness of the above rule and at the trial counsel for petitioner stated that no rights were claimed under the 1947 Act (R.39). But petitioners contend that valid contracts were created under the law as it existed prior to the 1947 amendment. We agree that when the 1947 act was declared invalid, the original law which it sought to repeal is still in force, and if the leases had been issued pursuant to the original law they would constitute valid contracts.

But the mere existence of a valid law, under which leases could have been issued, cannot validate these leases which were not issued thereunder, but were issued in conformity with the provisions of the unconstitutional law. The fact that these leases were all issued pursuant to the 1947 Act is fully established by the evidence and stands uncontradicted. This was the finding made by the trial court (R.27) and also by the Nebraska Supreme Court. In the Supreme Court opinion, Justice Boslaugh states: "These were applied for, issued, accepted and retained knowingly under the act of 1947, by all who were in any way interested in and concerned with them." Also, the three judge federal court, referring to the 1947 Act, at page 461 of the opinion, states: "Plaintiffs' and intervener's leases, as well as those of all other parties whom they can properly claim to represent, were admittedly applied for and accepted on that basis."

As soon as it was called to the attention of the Board of Educational Lands and Funds, by the opinion in the Ebke case, that these contracts were illegal and void, it became its duty to immediately abandon the contracts and offer the lands for lease in a lawful manner. This case does not involve merely an irregularity in the making of the contract but there was an absolute absence of power to enter into the same. An analogous situation arose in *Pennsylvania R. Co.* v. *St. Louis, Alton & Terre Haute R. Co.*, 118 U. S. 290, where this court said:

> "* * * We know of no well considered case where a corporation, which is party to a continuing contract which it had no power to make, seeks to retract and refuses to proceed further, can be compelled to do so. As was said in *Thomas* v. *Railroad*

> *Co.* (a case so often in point here), *'Having entered into the agreement it was the duty of the company to rescind or abandon it at the earliest moment.* This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done. Can this performance of a lawful duty, a duty which it owed to the stockholders of the company and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid. and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts'." (Emphasis supplied).

Counsel for petitioners refer to the "cancellation" of these leases. No lease contracts were ever cancelled by the Board and no contracts existed which might have been cancelled. All that the Board did by its order of August 13, 1951, was to recognize the invalidity of these contracts and set aside its orders which authorize the same. No rights of petitioner, or those whom they purport to represent, could be impaired because no rights were ever created by the unlawful agreements.

Petitioners and those whom they claim to represent entered into possession of the school lands under valid twenty-five year leases, which leases expired on December 31st of a given year. At their expiration new leases on the land were subject to sale and the lessee was required to surrender possession if some other person offered a higher bid and return to the State.

Because of an unconstitutional law, enacted by the Nebraska legislature for the special benefit of this group of leaseholders, they were permitted to retain possession of these lands for an additional period of from one to four years, at an inadequate rental. Because of the unconstitutional law the sales were delayed for a period of from one to four years and the common schools of the state have suffered loss of the additional revenue which would have resulted if sales had been held when the leases expired. All of the rights which these leaseholders had in the improvements on the lands have been fully protected. See:

State v. *Cooley*, 156 Neb. 330, 56 N. W. (2d) 129;

State v. *Gardner*, 156 Neb. 326, 56 N. W. (2d) 135.

CONCLUSION.

This case presents no federal question. The decision of the Nebraska court is correct and the petition for certiorari should be denied.

Respectfully submitted,

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